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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 ZACHARY L. HOLT (1), and
11 DEZMONIQUE D. TENZSLEY (2),

12 Defendants.

NO: 2:22-CR-0157-TOR-1 & 2

ORDER ON MOTIONS FOR
MISCELLANEOUS RELIEF

13 BEFORE THE COURT is Defendant Dezmonique D. Tenzsley's Amended
14 Motion(s) for Miscellaneous Relief (ECF No. 117) and Defendant Zachary L.
15 Holt's Motion for Joinder (ECF No. 115). These matters were submitted for
16 consideration at the Pretrial Conference on June 28, 2023. Bevan J. Maxey
17 appeared on behalf of Defendant Tenzsley. Robert M. Seines appeared on behalf of
18 Defendant Holt. Richard R. Barker appeared on behalf of the Government.
19 Defendants were not present. The Court proceeded with the Pretrial Conference
20 without Defendants as the hearing solely involved questions of law. Fed. R. Crim.

1 P. 43(b)(3). The Court reviewed the record and files herein, heard from counsel,
2 and is fully informed. This order supplements and memorializes the Court's oral
3 ruling.

4 **BACKGROUND**

5 On March 8, 2023, the grand jury returned a Superseding Indictment against
6 Defendants, charging First Degree Murder in Indian Country (Counts 1–2), Felony
7 Murder in Indian Country (Counts 3–4), Murder Resulting from Discharging and
8 Using a Firearm During and in Relation to a Crime of Violence (Counts 5–6),
9 Attempted Robbery in Indian Country (Count 7), Attempted Murder of a Federal
10 Officer (Count 8), Assault on a Federal Officer (Counts 9–10), Discharge of a
11 Firearm During a Crime of Violence (Count 11), Felon in Possession of
12 Ammunition as to Defendant Tenzsley (Count 12), Felon in Possession of a
13 Firearm and Ammunition (Count 13), Possession of Stolen Ammunition (Count
14 14), and Forfeiture Allegations. ECF No. 85.

15 **DISCUSSION**

16 **I. Motion to Dismiss**

17 Defendant Tenzsley moves to dismiss Counts 1 and 2 of the Superseding
18 Indictment under Rule 12(b)(1) for lack of evidence. ECF Nos. 117 at 1–2, 121 at
19 2. The Government opposes this motion, contending that the argument is at the
20 very least premature. ECF No. 119 at 17.

1 A party may file a pretrial motion on any issue that a court can determine
2 without a trial on the merits. Fed. R. Crim. P. 12(b)(1). Issues that may be
3 determined without a trial generally involve law rather than fact. *United States v.*
4 *Nukida*, 8 F.3d 665, 669 (9th Cir. 1993). A Rule 12(b) motion is premature where
5 it amounts to a challenge to the Government’s ability to prove a material element
6 of an offense. *Id.* at 669–70.

7 Defendant Tenzsley contends there is no evidence or testimony that he
8 unlawfully killed a human being with malice aforethought pursuant to 18 U.S.C.
9 §§ 1111, 1152, 1153, 2. ECF No. 117 at 2. Tenzsley asserts that the evidence
10 outlined by the Government show that he “was only aiding and abetting the
11 robbery that was part of the plan.” ECF No. 121 at 2. Alternatively, Tenzsley
12 requests that if the Court is unable to make a finding today, that the issue may be
13 raised at the next pretrial conference. *Id.* at 3. The Government contends that the
14 factual disputes as to Tenzsley’s state of mind must be decided by a jury.

15 As discovery is ongoing and this factual challenge goes directly to a material
16 element the Government must prove at trial, this motion is premature.
17 Accordingly, this motion is denied.

18 **II. Motion to Compel Discovery**

19 Defendants move to compel discovery, including forensic reporting, grand
20 jury materials, and certain *Giglio* materials. ECF No. 117 at 2–3. Defendants

1 request the Court compel the Government disclose this evidence within 60 days.

2 *Id.* The Government contends this motion is unnecessary where the Government is
3 not withholding material, and will provide such material as it becomes available –
4 either thirty days before trial or pursuant to an agreed-upon scheduling order. ECF
5 No. 119 at 14.

6 At the hearing, the parties acknowledged there is currently no withheld
7 evidence or dispute over evidence subject to disclosure. The Court encouraged the
8 Government to promptly turn over the requested material as it becomes available,
9 including the type of evidence that is currently being processed in the laboratory.
10 The Court notes that the Government is subject to a continuing duty to disclose the
11 existence of evidence that is subject to discovery or inspection. LCrimR 16(c).
12 Accordingly, this motion is denied.

13 **III. Motion to Sever**

14 Defendant Tenzsley asks this Court to sever the joint trial with Defendant
15 Holt based on his Sixth Amendment right to confront his accuser. ECF No. 117 at
16 4. The Government contends that the Confrontation Clause is not implicated under
17 these circumstances. ECF No. 119 at 19.

18 A court may sever a trial between codefendants if it appears a joint trial
19 “would prejudice a defendant or the government.” Fed. R. Crim. P. 14(a). The
20 federal system favors joint trials for jointly-indicted defendants. *Zafiro v. United*

1 *States*, 506 U.S. 534, 537 (1993). Thus, severance should only be granted “if there
2 is a serious risk that a joint trial would compromise a specific trial right of one of
3 the defendants, or prevent the jury from making a reliable judgment about guilt or
4 innocence.” *Id.* at 539.

5 “[A] defendant is deprived of his Sixth Amendment right of confrontation
6 when the facially incriminating confession of a nontestifying codefendant is
7 introduced at their joint trial, even if the jury is instructed to consider the
8 confession only against the codefendant.” *Richardson*, 481 U.S. 200, 207 (1987)
9 (citing *Bruton v. United States*, 391 U.S. 123 (1968)). In the Ninth Circuit, only
10 testimonial codefendant statements are subject to the federal Confrontation Clause
11 limits established in *Bruton*. *Lucero v. Holland*, 902 F.3d 979, 989 (9th Cir. 2018).
12 In *Lucero*, a jailhouse note was “not ‘testimonial’ under any plausible
13 understanding of that term. The [note] was not functionally identical to live, in-
14 court testimony,’ ... and it did not ‘have the primary purpose of assisting in the
15 defendant’s prosecution.’” *Id.* at 989 (citations and brackets omitted).

16 Here, Defendant Holt gave a fellow prisoner an account of the alleged events
17 that occurred on October 20, 2022. ECF No. 117 at 4 (citing ECF No. 114).
18 Holt’s recounting of events to a fellow inmate was not “functionally identical to
19 live, in-court testimony” that had “the primary purpose of assisting in [Tenzsley’s]
20 prosecution.” *Lucero*, 902 F.3d at 989. As the statements do not implicate the

1 Confrontation Clause, the Court declines to sever the joint trial. Fed. R. Crim. P.
2 14(a); *Zafiro*, 605 U.S. at 539.

3 Alternatively, Tenzsley asks the Court to redact the statements of the inmate
4 to remove both his name and any reference to him. ECF No. 121 at 5. However,
5 redaction is generally applicable if the testimonial statement would otherwise
6 violate the Confrontation Clause. *See Samia v. United States*, 599 U.S. ----, (June
7 23, 2023); *Lucero*, 902 F.3d at 987. As that is not the case here, redaction is not
8 warranted based on the nontestimonial nature of the statements. However, the
9 Court will entertain arguments as to whether the statements are otherwise
10 admissible under the Federal Rules of Evidence. Accordingly, this motion is
11 denied.

12 **IV. Motion to Continue**

13 A jury trial is scheduled to begin on July 10, 2023. Defendants now move,
14 unopposed by the government, to continue the trial date. Tenzsley asks for a trial
15 date in November 2023. ECF No. 117. Holt asks for a trial date no later than
16 September 5, 2023. ECF No. 116 at 1. At the hearing, Counsel noted that while
17 Holt prefers a September trial date, Holt's Counsel acknowledged that he would
18 not be ready to proceed at that time, and consequently agreed to a November date.

19 In support of the motion, Defendants explain additional time is necessary to
20 prepare for trial, including the time required to receive the outstanding evidence.

1 The Court also notes this matter was previously declared complex. Holt executed
2 a waiver of his speedy trial rights, ECF No. 116, and at the hearing, Counsel were
3 directed to provide Defendants with updated Speedy Trial Waiver forms. The
4 Court finds that Defendants require additional time to investigate and prepare for
5 trial, taking into account the exercise of due diligence, and that their interests
6 would not be adequately represented without a continuance. Accordingly, the
7 motion is granted.

8 **ACCORDINGLY, IT IS ORDERED:**

- 9 1. Defendant Dezmonique D. Tenzsley's Motion(s) for Miscellaneous
10 Relief (ECF No. 113) is **DENIED as moot**.
- 11 2. Defendant Zachary L. Holt's Motion for Joinder (ECF No. 115) is
12 **GRANTED in part and DENIED in part**.
- 13 3. Defendant Dezmonique D. Tenzsley's Amended Motion(s) for
14 Miscellaneous Relief (ECF No. 117) is **GRANTED in part and**
15 **DENIED in part**.
- 16 4. The Court sets additional pretrial conferences for **August 23, 2023 at**
17 **10:30 a.m. and October 26, 2023 at 10:30 a.m.** to address any other
18 pretrial motions. All pre-trial motions, including motions in limine and
19 *Daubert* motions, shall be filed and served on or before 2-weeks prior to
20 each Pretrial Conference and noted for hearing at the pretrial conference.


1 Any response to a pre-trial motion shall be filed and served in accordance
2 with Local Rule 7. If the Court determines an evidentiary hearing is
3 appropriate, the Court will notify the parties of the date and time for such
4 hearing.

- 5 5. The jury trial currently scheduled for July 10, 2023, is vacated and
6 continued to **November 6, 2023, at 8:30 a.m.**, in Spokane Courtroom
7 902. Counsel shall appear in court at 8:30 a.m. on the first day of trial to
8 address any pending pretrial issues. Jury selection will begin promptly at
9 9:00 a.m. Trial briefs, proposed voir dire, jury instructions, verdict
10 forms, exhibit lists, and expert witness lists shall be filed and served by
11 all parties on or before **seven (7) calendar days** prior to trial.
- 12 6. Pursuant to 18 U.S.C. § 3161(h)(7)(B), the Court excludes the time
13 between June 7, 2023, until November 6, 2023, for purposes of
14 computing time under the Speedy Trial Act. The Court finds that the
15 ends of justice served by such a continuance outweigh the interests of the
16 public and Defendants in a speedy trial.
- 17 7. Counsel are directed to promptly provide Defendants with updated
18 Speedy Trial Waiver forms, advise them of their rights and file the
19 executed forms forthwith in the Court record.
20

1 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
2 order and provide copies to counsel, the United States Probation Office, and the
3 United States Marshal's Service.

4 DATED June 28, 2023.




THOMAS O. RICE
United States District Judge